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IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
Petitioner,

v.

THE HONORABLES C. WILLIAM O'NEILL,
Chief Justice, et als.,
Respondents.

PETITIONER'S REPLY MEMORANDUM AND SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE CASE IS NOT MOOT NOR WAS THE SIXTH CIRCUIT'S DISMISSAL CORRECT IN ANY RESPECT

Respondents contend at p. 5 of their Brief In Opposition to the Petition for Certiorari that since the Supreme Court of Ohio has completed the disciplinary proceedings against Judge Heitzler that the case is moot. Petitioner submits that because he can apply for reinstatement in the practice of law at the end of two years, and because the Supreme Court of Ohio may deny Petitioner's request for reinstatement, and

because the Rules for the Government of the Bar of Ohio will in any event, remain in full force and effect in the interim subjecting other members of the Ohio Judiciary and Bar to similar constitutional and civil rights deprivations, it is by no means,

> ". . . absolute[ly] clear that the alleged wrongful behavior could not reasonably be expected to recur." *Johnson* v. *New York State Education Department*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 290, 293 (1972) Concurring opinion per Justice Marshall.

See also: *United States* v. *Concentrated Phosphate Export Association*, 393 U. S. 199, 203, 89 S.Ct. 361, 21 L.Ed. 2d 344 (1968); *Indiana Employment Division* v. *Burney*, ... U. S. ..... 93 S.Ct. ....., 35 L.Ed. 2d 62, 65 (1973). The case is therefore not moot. Furthermore, the "collateral consequences"[1] of reinstatement under Gov. R. V alone are sufficient to negate any suggestion of mootness. *Sibron* v. *New York*, 392 U. S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968).

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[1] While Judge Heitzler's suspension is in effect the Board of Commissioners on Grievances and Discipline is empowered to: (1) investigate any complaints made against one subject to an indefinite suspension Gov. R. V (2) (a); (2) generally conduct an investigation and take evidence relating to a petition for reinstatement Gov. R. V (2) (b), and Gov. R. V (25); and (3) investigate and take evidence relating to any alleged contempt of any order issued by the Supreme Court of Ohio Gov. R. V (2) (d). . . .

Judge Heitzler can next petition for reinstatement two years after the date of the entry of the order indefinitely suspending him and if this is denied, another two years must elapse before reinstatement can again be sought, Gov. R. V (21). Petitioner's past record during reinstatement proceedings is open to scrutiny and additional evaluation. Gov. R. V (22). Any unpaid costs must be paid as a prerequisite to any reinstatement effort, Gov. R. V (23), and the Reinstatement inquiry is open to the obvious discretion of whether the petitioner is now possessed with "all of the qualifications, mental, educational, and moral . . . ." that are required. Gov. R. V (24). A new hearing must be held and more testimony taken. Gov. R. V (25), (26). The Supreme Court of Ohio finally rules on the merits of the petition for reinstatement. Gov. R. V (26).

Assuming even *arguendo*, the case could be moot, the proper course would be to remand the case to the Sixth Circuit with directions to remand it to the United States District Court for the Northern District of Ohio to ascertain if the case is in fact, moot, *Johnson* v. *New York State Education Department*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 290, 291 (1972); *Indiana Employment Division* v. *Burney*, ... U. S. ....., 93 S.Ct. ....., 35 L.Ed. 2d 62, 63 (1973); *Dillard* v. *Industrial Commission* ..... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 444 (1972) or in the alternative to remand the case to the District Court and permit Petitioner to amend his complaint.

As to the merits of the district court's jurisdiction, Respondents brief entirely ignores the Sixth Circuits' holding in *Taylor* v. *Kentucky Bar Association*, 424 F. 2d 478 (6th Cir. 1970) and the opinion on remand *granting* to the district court jurisdiction in a federal civil rights case under 42 U. S. C. §1983. As already discussed, *Erdmann* v. *Stevens*, 458, F.2d 1205 (2nd Cir. 1972) certiorari denied 93 S.Ct. 126 (1972) *supports* the jurisdiction of the federal district court. (Petition at pp. 26-27).

PETITIONER'S FIRST AND FOURTEENTH AMENDMENT CLAIMS ARE SUBSTANTIAL

Respondent characterizes Petitioners' First and Fourteenth Amendment claims as "anemic" (Brief pp. 5-6). To the contrary, reference to Respondent's own Appendix, (pp. A-14-15) wherein the Opinion of the Supreme Court of Ohio is set out clearly notes that Petitioner not only alleged that his First and Fourteenth Amendment rights were infringed (Pet. App.

pp. A-17, A-25, 26), but the Supreme Court of Ohio based its very holding on those associations Judge Heitzler claims are protected by the First and Fourteenth Amendments (Resp. App. A-14-15). The ultimate restriction upon Judge Heitzler's conduct as embodied in the Opinion of the Supreme Court of Ohio sweeps almost as broad as the unnecessary restriction on the First and Fourteenth Amendment rights presented in the recent Civil Rights case of *Lynch* v. *Snepp*, 350 F. Supp. 1134, 1139 (W. D., N. C., Char. Div. 1972) wherein the court held that:

> " 'Our federalism' (Younger v. Harris, 401 U. S. 37, 91 S.Ct. 746, 27 L.Ed.2d 699 (1971) provides a dual system of state and federal servants. Comity, a judicial doctrine, contemplates that federal and state courts respect each other's opinions and problems. This minimizes conflicts. It is everyday courtesy. *The United States Constitution, the supreme law of the land, values human freedom more than judicial courtesy, and requires that all state and federal judges respect the Bill of Rights, including rights of free speech and expression. Abstention, comity, and federalism are not valid reasons, on this record, for shirking this court's duty to investigate and protect against the alleged serious threats to constitutional freedom.* The case should be decided on its merits." (Emphasis added.)

The instant case, like *Lynch* should be decided on the merits.

THE SIXTH CIRCUIT ERRED IN DISMISSING PETITONER'S CASE

The Respondent in the instant case in its Brief entirely ignores the recent unanimous pronouncement by this Court in *American Trial Lawyers Association* v. *New Jersey Supreme Court*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 651 (January 15, 1973) concerning postponement and retention of federal jurisdiction in an abstention situation *rather than a dismissal.* "The proper course is for the District Court to *retain* jurisdiction pending the proceedings in the state courts." (Emphasis added.) 34 L.Ed. 2d 651, 653. The Court of Appeals thus erred in ordering the District Court to dismiss the case.

Petitioner again submits that the venue was in fact proper under 28 U.S.C. §1392 (a) and the Court is respectfully referred to the Petition (pp. 30-32) for the authorities and arguments presented there.

THE SIXTH CIRCUIT FILED THEIR *PER CURIAM* OPINION ON NOVEMBER 10, 1972, WITHOUT NOTICE OR ORAL ARGUMENT, OR BRIEF DIRECTED TO THE PROPRIETY OR LACK OF IT CONCERNING THE PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION.

Respondents, in the Counterstatement of Case at p. 3 of their Brief in Opposition state that the Sixth Circuit's Order ". . . was entered only after it had had an opportunity to review Petitioner's extensive brief." Petitioner again submits that the Sixth Circuit filed their *Per Curiam* opinion of November 10, 1972 without notice, without oral argument, and without a brief

directed to the propriety or lack of it concerning the Petition for Writ of Mandamus and/or Prohibition.

As the record will readily verify, Petitioner filed in the Sixth Circuit a Motion and Brief in support thereof to dissolve, vacate, dismiss or modify the *Stay Order* previously entered by the Sixth Circuit. Petitioners Motion was made *primarily* to secure the stay, not with a view toward the propriety or lack of it concerning the Petition for Writ of Mandamus and/or Prohibition itself although the brief did summarily state that the Anti-Injunction Act was not applicable. (See Petition pp. 10, 11).

CONCLUSION

For the reasons embodied in the Petition and those set out in this Reply Memorandum, the Writ of Certiorari should be granted.

Dated: March 23, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Reply Memorandum and Supplemental Appendix upon Victor E. DeMarco, Esquire, Jones, Day, Cockley & Reavis, 1750 Union Commerce Building, Cleveland, Ohio, 44115, Attorneys for Respondent, and upon the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, at Cleveland, United States Court House, Cleveland, Ohio 44114, and upon the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing same in the United States mail, postage prepaid, air mail, this 23 day of March, 1973.

Stanley E. Preiser

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Of Counsel for Petitioner

SUPPLEMENTAL APPENDIX

Page

1. Opinion, *Burks* v. *Perk*, United States Court of Appeals for the Sixth Circuit, F.2d (November 17, 1972) ... SA-2 to SA-6

2. Opinion, *In re*: *Petition for Reinstatement of John Ruffalo, Jr.* On Certified Report by the Board of Commissioners on Grievances and Discipline ... SA-6

This Supplemental Appendix contains the opinions in the *Burks* v. *Perk* decision and the opinion in the reinstatement petition of John Ruffalo. The *Burks* v. *Perk* decision is cited in Judge Heitzler's Petition for Writ of Certiorari at pp. . . . 24, 29 at n. 1. The *Ruffalo* decision denying John Ruffalo reinstatement to practice is cited in Judge Heitzler's Petition for Writ of Certiorari at p. 24.

These opinions were unavailable to Petitioner's counsel as of February 8, 1973 and are now respectfully submitted for their consideration by this Honorable Court.

No. 72-1368

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WALTER A. BURKS, JR., ET AL.,
Plaintiffs-Appellees,

v.

RALPH PERK, Mayor of the City of Cleveland, Ohio,
Defendant-Appellant.

APPEAL from United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed November 17, 1972.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and BRATCHER*, District Judge.

PER CURIAM. Ralph Perk, Mayor of the City of Cleveland, Ohio, has appealed from an order of the District Court restraining and enjoining him from conducting a hearing on written charges of neglect of duty and malfeasance in office, which charges were made against five members of the Civil Service Commission of the City.

The written charges specified the acts of neglect of duty and malfeasance in office, gave to each Commis-

* The Honorable Rhodes Bratcher, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

sioner more than ten days' notice of the time and place of a public hearing thereon before the Mayor, and stated that each Commissioner would have opportunity to be heard in person and by counsel and to present evidence in his defense.

Instead of resisting the charges at a hearing before the Mayor, who had the power of appointment as well as removal for cause, under the City Charter, the Commissioners joined in filing in the District Court a complaint against the Mayor seeking to enjoin even the hearing, and alleging that there is a conflict between a state statute and the City Charter; that no judicial review of the Mayor's decision is available in the state; that the Mayor is biased; that the charges are not sufficiently specific; and that the procedure of the City Charter violates the due process clause of the Fourteenth Amendment.

Jurisdiction of the Court was founded on 28 U.S.C. §§ 1331, 1343 and 1983.

On plaintiffs' motion for a temporary restraining order the District Court heard arguments of counsel but took no evidence. Following the hearing the Court filed a written memorandum and order in which it did not determine any issues of state law, but suggested that plaintiffs file an action for declaratory judgment in the state court, (which they later did), and issued a preliminary injunction restraining the Mayor from conducting any hearing while the state issues were being determined in the state court. The District Court reserved for itself the determination of the federal questions raised. The District Court has thus bifurcated the case, with one part pending in the Com-

mon Pleas Court, and another part in the District Court, and has prevented the Mayor from conducting any hearing on the charges.

In our opinion the Mayor had full power and authority to hear and determine the charges against the Commissioners under Section 124 of the Charter of the City of Cleveland, which provides as follows:

> "A member of the civil service commission may be removed by the mayor for neglect of duty, incapacity, incompetency, or malfeasance in office, but only after opportunity has been given for a public hearing before the mayor, to be held at least ten days after written charges have been made and notice thereof been given to the accused member. Such member shall be heard in person or by counsel; and such removal shall be final."

Contrary to the claim of appellees, a judicial review of a final decision of the Mayor is expressly provided by Section 2506.01, Ohio Revised Code (Supp.), as follows:

> "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in section 2505.01 to 2505.45, inclusive of the Revised Code, and as such procedure is modified by section 2506.01 to 2506.04, inclusive of the Revised Code."

By virtue of this statute the Commissioners could have obtained a judicial review of any final decision

of the Mayor, in the Common Pleas Court of Cuyahoga County.

The Common Pleas Court in Ohio, unlike the United States District Court, which is a court of limited jurisdiction, is a court of general jurisdiction. If it became necessary to restrain enforcement of an adverse decision of the Mayor pending review, the Common Pleas Court had full power and authority to enjoin such enforcement. The Commissioners thus had an adequate remedy under state law. They ought not be permitted to frustrate state procedures by resorting to Federal Courts in the first instance. No irreparable injury to plaintiffs has been alleged or shown.

The Commissioners do not have a constitutional right to public employment. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961); *Orr* v. *Trinter*, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

Public office is not property within the meaning of the Fourteenth Amendment. *Taylor & Marshall* v. *Beckham*, 178 U.S. 548 (1900).

In *Wilson* v. *North Carolina*, 169 U.S. 586 (1898), the Court held that the removal of a railroad commissioner by the Governor of a state which by statute had vested in him the power of appointment and removal, did not deprive the commissioner of his property without due process of law.

But even if the Commissioners in the present case had a property interest in their offices, the provisions for notice and hearing on removal charges provided in

the City Charter, and the right of review by the state courts, would seem to comply with due process requirements. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

Federal Courts ought not intrude in controversies between state political subdivisions and their officers, over the title to a state office or the rights of persons appointed to such office. We ought not strain unnecessarily the relationship between federal-state judicial systems.

The judgment of the District Court is reversed; the injunction is dissolved; and the cause is remanded to the District Court with instructions to dismiss the complaint.

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45 Ohio Bar 1654

DISCIPLINARY DOCKET DECISION: DD 57. In re: Petition for Reinstatement of John Ruffalo, Jr. (December 4, 1972)

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE.

On Petition for Reinstatement. Report confirmed and reinstatement denied.